

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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PLR-103044-21

Date:

August 5, 2021

Legend

Taxpayer =

Subsidiary =

Sponsor =

Fund =

Partnership =

Law Firm X =

Law Firm Y =

Accounting Firm =

State =

City =

Hotel =

Date 1 =

Date 2 =

Date 3 =
Date 4 =
Date 5 =
Date 6 =
Month 1 =
Month 2 =
Month 3 =
Year 1 =
Year 2 =
Year 3 =
x =

Dear :

This letter responds to a letter dated January 29, 2021, submitted on behalf of Taxpayer and Subsidiary. Taxpayer and Subsidiary request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election to treat Subsidiary as a taxable REIT subsidiary (TRS) of Taxpayer under section 856(l) of the Internal Revenue Code (the Code) effective Date 3.

FACTS

Sponsor is a manager of investment partnerships formed to make equity and debt investments in a diversified portfolio of hotel real estate assets and operating companies. In Month 1 of Year 1, Sponsor sponsored a new fund, Fund, a State limited partnership that is classified as a partnership for U.S. federal income tax purposes. Fund was formed to generate returns for its partners by acquiring, holding, maintaining, operating, leasing, managing, developing, redeveloping, improving, mortgaging, encumbering, and selling for profit equity and debt interests in hotel real estate and related assets. Sponsor provides all management services to Fund and Taxpayer.

In the beginning of Year 2, Fund investigated entering into its first joint venture transaction to acquire and operate Hotel. At that time, Sponsor's legal counsel, Law Firm X, advised Fund regarding the possibility of owning its interest in the joint venture through a real estate investment trust (REIT). Accordingly, Fund formed Taxpayer as a

REIT on Date 1. At the same time, the two other funds managed by Sponsor (the Other Sponsor Funds) were also exploring similar joint ventures and also created their own REITs to hold those joint venture interests.

In Year 2, Fund also acquired an indirect interest in x percent of the capital and profits interests of Partnership, a State limited liability company that is classified as a partnership for U.S. federal income tax purposes. Partnership owned a vacant building and an adjacent land site located in City. Fund and its joint venture partner intended for this property to be developed into a hotel. Based on advice from Law Firm X, Fund intended to implement an arrangement whereby Partnership would lease the hotel to a corporation owned by Taxpayer that would qualify as a TRS and the TRS would engage an eligible independent contractor within the meaning of section 856(d)(9) to operate the hotel (an arrangement commonly referred to as a "RIDEA structure"). Specifically, it was contemplated that Partnership would lease the hotel to Subsidiary, an entity wholly owned by Taxpayer.

In the spring of Year 2, Sponsor engaged Law Firm X to implement a restructuring of the joint venture investments of Fund and the Other Sponsor Funds to hold certain real estate investments, including those of Partnership, through REITs (the Restructuring). The Restructuring was effective Date 2. As related to Fund, Law Firm X prepared all necessary legal documentation related to Taxpayer and the contribution of the interests in Partnership. As part of the Restructuring, Law Firm X prepared a draft Form 8875, *Taxable REIT Subsidiary Election*, for Subsidiary because Taxpayer intended for Subsidiary to be treated as a TRS. Law Firm X erroneously believed that Subsidiary was not yet formed and advised that the draft TRS election for Subsidiary could not be filed until the entity was formed, an EIN was obtained, and Form 8832, *Entity Classification Election*, was filed. Law Firm X handled the TRS elections with respect to the other relevant entities involved in the Restructuring and those TRS elections were timely filed.

Consistent with Taxpayer's intent to treat Subsidiary as a TRS, Sponsor filed, on behalf of Subsidiary, an election on Form 8832 to change Subsidiary's classification to a corporation for U.S. federal income tax purposes effective Date 3. For an effective date of Date 3, the TRS election for Subsidiary should have been made by Date 4. However, as a result of miscommunication and oversight, the TRS election for Subsidiary was not timely filed. Law Firm X was unaware that Sponsor filed Form 8832 for Subsidiary and accordingly was unaware that the draft TRS election needed to be revised and subsequently filed. In addition, no one at Sponsor recalled the instructions Law Firm X provided previously to file the Form 8875 once a Form 8832 was filed.

Before the formation of Taxpayer and the REITs for the Other Sponsor Funds, Sponsor did not have any experience with REITs. Sponsor does not have an in-house tax department. Thus, Sponsor has relied heavily on external advisors to assist with the initial and ongoing REIT qualification requirements. Law Firm X assisted Sponsor with implementation of the REIT structure for Taxpayer and the REITs for the Other Sponsor Funds. In addition, in Month 3 of Year 2, Sponsor engaged Accounting Firm to prepare

initial U.S. federal income tax returns for Taxpayer and the REITs of the Other Sponsor Funds. Sponsor hired Accounting Firm because it recognized that the use of REITs by Fund and the Other Sponsor Funds necessitated engaging a professional services firm with significant REIT experience. Accounting Firm was not engaged to prepare Forms 8832 or 8875 for any of the entities that Taxpayer directly or indirectly owned.

In early Year 3, Sponsor began to evaluate the acquisition of another hotel asset by another one of its managed funds. During this process, proposed acquisition vehicles and structures were considered, including the use of one or more REITs and a RIDEA structure. In Month 2 of Year 3, Law Firm Y, who was advising on the acquisition, asked Accounting Firm to confirm that Accounting Firm planned to file the TRS elections for the relevant entities. Accounting Firm indicated it was not previously engaged to prepare TRS elections. At that point, Sponsor's Chief Financial Officer realized that neither Law Firm Y nor Accounting Firm was generally engaged to prepare TRS elections and wanted to ensure all TRS elections were timely filed so immediately began to take a full inventory of TRS elections for each corporation directly or indirectly owned by a REIT that was directly or indirectly owned by an investment partnership managed by Sponsor. At the conclusion of this process, Sponsor identified the failure to file a timely TRS election for Subsidiary. Immediately thereafter, Sponsor engaged Accounting Firm to prepare this request for an extension of time with respect to Subsidiary.

REPRESENTATIONS

Taxpayer makes the following representations in connection with this request for an extension of time:

1. The request for relief was filed by Taxpayer and Subsidiary before the failure to make the regulatory election was discovered by the Service.
2. Granting the relief will not result in Taxpayer and Subsidiary having a lower tax liability in the aggregate for all years to which the regulatory election applies than they would have had if the election had been timely made (taking into account the time value of money).
3. Taxpayer and Subsidiary did not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 of the Code at the time they requested relief and the new position requires or permits a regulatory election for which relief is requested.
4. Being fully informed of the required regulatory election and related tax consequences, Taxpayer and Subsidiary did not choose to not file the election.
5. Taxpayer and Subsidiary are not using hindsight in requesting this relief. No specific facts have changed since the due date for making the election that make this election advantageous to Taxpayer and Subsidiary.

6. Except for the tax returns for Taxpayer and Subsidiary for the taxable year ended Date 5 and the tax return for Subsidiary for the taxable year ended Date 6, the period of limitations on assessment under section 6501(a) of the Code has not expired for Taxpayer and Subsidiary for the taxable year for which the election should have been filed, nor for any taxable years that would have been affected by the election had it been timely filed.

In addition, affidavits on behalf of Taxpayer and Subsidiary have been provided as required by section 301.9100-3(e)(2) and (3).

LAW AND ANALYSIS

Section 856(l) provides that a REIT and a corporation (other than a REIT) may jointly elect to treat such corporation as a TRS. To be eligible for treatment as a TRS, section 856(l)(1) provides that the REIT must directly or indirectly own stock in the corporation, and the REIT and the corporation must jointly elect such treatment. The election is irrevocable once made, unless both the REIT and the subsidiary consent to its revocation. In addition, section 856(l) specifically provides that the election, and any revocation thereof, may be made without the consent of the Secretary.

In Announcement 2001-17, 2001-1 C.B. 716, the Service announced the availability of new Form 8875, *Taxable REIT Subsidiary Election*. According to the Announcement, this form is to be used for taxable years beginning after 2000 for eligible entities to elect treatment as a TRS. The instructions to Form 8875 provide that the subsidiary and the REIT can make the election at any time during the taxable year. However, the effective date of the election depends on when the Form 8875 is filed. The instructions further provide that the effective date cannot be more than 2 months and 15 days prior to the date of filing the election, or more than 12 months after the date of filing the election. If no date is specified on the form, the election is effective on the date the form is filed with the Service.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) to establish to the

satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer generally is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section before the failure to make the regulatory election is discovered by the Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. A taxpayer will be deemed to have not acted reasonably and in good faith, however, if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

Under all the facts and circumstances of this case as presented by Taxpayer and Subsidiary, we have determined that the interests of the Government are not prejudiced under the standards set forth in section 301.9100-3(c)(1)(i).

CONCLUSION

Based on the information submitted and representations made, we conclude that Taxpayer and Subsidiary have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat Subsidiary as a TRS of Taxpayer effective Date 3. Accordingly, Taxpayer and Subsidiary have 90 calendar days from the date of this letter to make the intended election to treat Subsidiary as a TRS of Taxpayer effective Date 3.

CAVEATS

This ruling is limited to the timeliness of the filing the Form 8875. This ruling's application is limited to the facts, representations, and Code and regulation sections cited herein. Except as provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed or implied regarding whether Taxpayer otherwise qualifies as a REIT, or whether Subsidiary otherwise qualifies as a TRS of Taxpayer under part II of subchapter M of chapter 1 of the Code.

The ruling contained in this letter is based upon information submitted and representations made by Taxpayer and Subsidiary and accompanied by penalties of perjury statements executed by the appropriate parties. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Bernard J. Audet, Jr. _____
Bernard J. Audet, Jr.
Assistant to the Branch Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: